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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 469

EX PARTE WORCESTER COUNTY NATIONAL BANK, OF Worcester, a corporation, appellant, In Re estate of Julia A. Legnard

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ

May it please the Court:

The undersigned, as Counsel for the Comptroller of the Currency, respectfully move this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

F. G. AWALT,
Counsel for the Comptroller of the Currency.

GEORGE P. BARSE,
Assistant Counsel
for the Comptroller of the Currency.

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 469

EX PARTE WORCESTER COUNTY NATIONAL BANK OF Worcester, a Corporation, appellant

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IN RE ESTATE JULIA A. LEGNARD

BRIEF OF THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIÆ

Comes now John W. Pole, Comptroller of the Currency of the United States, and, by leave of Court first had and obtained respectfully submits his brief, as amicus curiæ.

INTEREST OF THE COMPTROLLER OF THE CURRENCY IN THE CASE

The Comptroller of the Currency is charged with the general supervision of the National banking system. He supervises the formation of the banks, the issue, security and redemption of their notes, their condition as going banks and in event of insolvency the winding up of their affairs. He is

charged with the approval of conversions of State into National banks, and the consolidation of national banks and of State with National banks. There has also been placed upon him the duty of recommending to Congress any amendment to the laws relative to banking by which the system may be improved. Any matter which may adversely affect the integrity of the National banking system is his concern. This case not only affects the true construction of a Federal statute enacted upon his recommendation to improve, strengthen and safeguard the National system, but involves the integrity of such system.

This decision, as hereinafter set forth, has already seriously affected the National banking system and will have a far reaching effect in the future.

The purpose of this brief is to invite the court's attention, as throwing light upon the construction of the Federal statute under consideration, to the conditions anterior to the passage of the statute sought to be remedied thereby, the relation of those conditions and the relief sought to the National banking system, and to the fundamental principles of National bank law which the Comptroller feels should control in disposing of the questions in issue. No extended citation of authorities in support of detailed argument will be attempted. Being in full accord with the arguments and reasoning of the appellant, it is deemed unnecessary here to reiterate what is there said.

SUMMARY OF FACTS

The facts in the case, which are set out in more detail in appellant's brief, may be stated here briefly as follows: On April 21, 1926, the Fitchburg Bank and Trust Company, a corporation organized under the laws of Massachusetts, was appointed executor of the will of Julia A. Legnard by the Probate Court of Worcester County, Massachusetts. (Record, pp. 3, 5, and 7.) On June 27, 1927, a certificate was issued by the Comptroller of the Currency approving the consolidation of the Merchants National Bank of Worcester, Massachusetts, and the Fitchburg Bank and Trust Company. The consolidated bank took the name of Worcester County National Bank of Worcester. This consolidation was effected under the national charter pursuant to a provision of the Act of Congress of February 25, 1927, Chapter 191, Sec. 1, 44 Stat. 1225, 12 U. S. C. Chapter 2, Sec. 34(a), providing for the consolidation of any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, with a national banking association located in the same county, city, town or village, under the charter of such National banking association under certain conditions, and providing further that the

> consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interests *including the right of succession as trustee, execu-*

> *tor, or any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State* or District bank so consolidated with such national banking association.

Thereafter on the 11th day of February, 1928, the Worcester County National Bank of Worcester attempted to file the first and final account of the Fitchburg Bank and Trust Company as executor covering a period between the 21st day of April, 1926, and the 9th day of February, 1928. The account was rendered for the trust company to June 27, 1927, and thereafter as the national bank's own account. (Record, p. 8.) The Probate Judge found that the account was in proper form and should be allowed if the Worcester County National Bank, as successor or otherwise, was executor of the will, or had the right to render the account under the laws of the United States. (Record, p. 12.) He further stated, "Without action upon said account, I report the above facts and the question of law involved, for the consideration and determination of the full court, as to whether the petitioner is entitled to render said account." (Record, p. 13.) Thereafter on May 24, 1928, the Supreme Judicial Court of Massachusetts answered the question submitted in the negative, holding the Federal statute involved unconstitutional, in so far as said statute provided for the succession of the consolidated bank as executor by operation of law, and instructed

the Probate Court accordingly. (Record, p. 30.) Pursuant to these instructions the Probate Court of Worcester County entered upon its docket a dismissal of the petition for the allowance of the account.

CONDITIONS SOUGHT TO BE REMEDIED BY THE STATUTE, THE RELIEF SOUGHT, AND THE RELATION OF THE SAME TO THE NATIONAL SYSTEM

The particular provision of legislation here called into question forms a part of the Act entitled "An Act to Further Amend the National Banking Laws and the Federal Reserve Act and for other Purposes," approved February 25, 1927. (C. 191, Sec. 1, 44 Stat. 1225, Title 12, U. S. C., C. 2, Sec. 34 (a).) This Act followed upon urgent recommendation by the Comptroller of the Currency in his annual reports to Congress for the years 1924, 1925, and 1926.

In the six years preceding the passage of the Act, the National system lost more than $2,230,000,000 in resources to the State system. This was due in a large measure to the comparative inflexibility of the National system which did not enable National banks to give complete modern banking service and meet the competition of the various State systems. Moreover since there was no provision of law allowing State institutions to consolidate directly with National banks under National charter, National banks were leaving the system to merge with State institutions under State charter. Congress,

recognizing the trend toward mergers and consolidations among financial institutions, and the fact that competing State institutions were permitted to consolidate under the laws of various states, sought a method to strengthen and preserve the Federal System.

It was realized that to penalize the State bank willing to consolidate with a National bank by taking away its existing trust and fiduciary business would defeat such consolidation under Federal charter and result, where the National bank desired to go through with the merger, in the National bank leaving the Federal system. The Federal statute sought to remedy this by specifically providing that where a State bank consolidates with a National bank under the latter's charter, the consolidated institution should take over, not only all property rights of the State bank and the right to continue in the future its trust and fiduciary business, but also the right, as an incident to the transfer, and by virtue of the fact of consolidation, to continue and to succeed to the existing trusts and fiduciary business already upon the books of the State bank, the provisions of the Federal statute in that respect being as follows:

> * * * and all the rights, franchises, and interests of such State or District bank so consolidated with a national banking association in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to

be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, *and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interest including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association.*

The decision of the Supreme Judicial Court of Massachusetts in the instant case has the effect of nullifying the very purpose of the statute as enacted by Congress. In substance it denies the right to take over trust and fiduciary business already upon the books of the State institution and requires the consolidated bank to relinquish such business and enter into competition with others for such business. The State institution acting under the appointments as trustee, executor, or in any other fiduciary capacity, and often with ambulatory wills on hand, naming it as executor or other fiduciary, will not consolidate under the National charter if there is any doubt that the proposed consolidation will be legally entitled to continue to transact this business or if in order to transact business it is necessary to go into court or otherwise obtain and seek reappointments for the consolidated institution. The result is that the National bank having no such

complications, goes out of the system in order to make the merger.

In this connection the court's attention is directed to the fact that two of the largest and strongest national banks in the Western part of the United States are merging with State trust companies under the charter of the State institution. In both of these cases the Comptroller of the Currency has been reliably informed that the sole reason for the mergers under the State charters is the decision of the lower court in this case and the consequent refusal of the trust companies handling large estates and trusts to seek the reappointment for the consolidated institution apparently necessary under the National charter. Moreover there are at least three known consolidations awaiting the decision of this court in this case; each involving the surrender of a National charter, if the right of succession is held not to exist.

It may be reasonably anticipated in the light of the present effect upon the National system of the decision of the Massachusetts court that if the decision is allowed to stand the National system will be greatly weakened and impaired. This is especially true in view of the large and constant growth of the fiduciary business among banks.

FUNDAMENTAL PRINCIPLES OF THE NATIONAL BANKING SYSTEM HERE INVOLVED

It is, of course, no longer open to question: That Congress has the power to provide for the creation

of National Banks as Federal Agencies, and to prescribe the scope of their powers to the extent considered necessary for efficient operation and successful competition with State Banks; that such authority of Congress is paramount, and can not be restricted or nullified by the States, either by legislative action or by judicial decision; and that among the powers thus properly conferred by Congress upon National Banks is the right to exercise trust and fiduciary functions—*McCullouch* v. *Maryland*, 4 Wheat. 316; *Osborne* v. *Bank*, 9 Wheat. 738; *First National Bank* v. *Fellows*, 244 U. S. 416; *Burnes National Bank* v. *Duncan*, 265 U. S. 17.

It is also no longer open to question that the consent of the State is not necessary as a condition precedent, to the State institution going into the National System by conversion (*Casey* v. *Galli*, 94 U. S. 673, 678), and with reference to the consolidation of the State Bank with the National Bank in the instant case the court below, in its opinion, said:

> We are unable to perceive any sound distinction between the power of Congress to authorize the conversion of a State Bank into a national bank and its power to authorize the consolidation of a State bank with a national bank under the charter of the national bank. If no State legislation was necessary to accomplish such conversion, it seems to us that no State legislation is necessary to accomplish such consolidation. Re-

> lying upon the authority of *Casey* v. *Galli*, 94 U. S. 673, we are of opinion that in general consolidation of a Massachusetts trust company with a national banking association as prescribed in the Act of Congress of February 25, 1927, c. 191, § 3, is permissible and valid.

In view of the foregoing it would seem logical to conclude that all appointments by State courts of State banks to trusts and fiduciary capacities must be considered to have been made subject to the reserved and paramount power of Congress, to create, control, supervise, and extend the National Banking system and as an incident thereto to provide for the State Banks coming into the National System, whether by conversion into a National Bank without consolidation (as in *Casey* v. *Galli*) or by conversion through consolidation, and for the passage by operation of the enabling statute of all property, rights, and privileges to the reorganized bank. The principle would seem to be the same in either event, and if the consent of the State is not necessary in the case of conversion *without* consolidation it would seem to be clearly unnecessary in conversion *through* consolidation.

That there is no special or peculiar feature inherent in the office of executor or administrator or other fiduciary capacity which can impede the plenary action of Congress in thus exercising its paramount authority in protecting and strengthening the National Banking System would seem to be

clearly indicated in the case of *Burnes National Bank* v. *Duncan*, 265 U. S. 17, 24. In that case the National Bank filed mandamus to compel the State Probate Court to issue to it letters testamentary, it having been nominated executor under a will. Appointment by the Probate Court was denied on the ground that by the laws of the State, National Banks were not authorized to act as executors. The National Bank claimed the right to so act under the provisions of the Act of September 26, 1918 c. 177, § 2, 40 Stat. 967, 968 amending § 11 (k) of the Federal Reserve Act, wherein the Federal Reserve Board had been empowered by Congress to grant, by special permit to National Banks applying therefor, when not in contravention of State or local law, "the right to act as trustee, executor, administrator * * * or in any other fiduciary capacity in which State Banks, trust companies or other corporations which come into competition with National Banks are permitted to act under the laws of the State in which the National Bank is located," said statute further providing that whenever the laws of the State permitted the exercise of such powers by State Banks or trust companies or other corporations which were in competition with National Banks, the granting of such powers under the Federal statute to National Banks should not be deemed to be in contravention of the State law. In construing this statute this court said:

> Now that Congress has expressed its paramount will this language is more apposite

than ever. The States can not use their most characteristic powers to reach unconstitutional results. (*Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1. *Pullman Co.* v. *Kansas*, 216 U. S. 56. *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114.) There is nothing over which a State has more exclusive authority than the jurisdiction of its courts, but it can not escape its constitutional obligations by the device of denying jurisdiction to courts otherwise competent. (*Kenney* v. *Supreme Lodge of the World*, 252 U. S. 411, 415.) *So here—the State can not lay hold of its general control of administration to deprive national banks of their power to compete that Congress is authorized to sustain.* (Italics inserted.)

The objection that the consolidated institution is a different corporation from the one originally vested with the trust or fiduciary appointment, is at most purely technical, and substance rather than form should govern. It is not questioned that it was intended by Congress, by virtue of the specific provisions of the statute, that every species of property, real, personal and mixed, choses in action, and rights of every character "including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or district bank so consolidated with such national banking association" should be considered as vested

in the consolidated institution without necessity for any deed or other transfer. For all practical purposes the identity of the State institution was preserved just as much as though Congress in specific terms had so provided. Furthermore, it can not be questioned that the consolidated institution is subject to all the liabilities of the State Bank including the liability of accounting for the assets of the various estates which were being handled by the State bank in its trust or fiduciary capacity and the liability, if any, of said State institution for previous mismanagement of said trust estates, and, consequently it is only logical to conclude, in that connection, that the consolidated bank so far as said trust estates are concerned, takes over the rights and emoluments and offices incident thereto, including the right to continue to exercise such functions in existing cases until discharged in due course or otherwise displaced by proper court action.

CONCLUSION

Congress, in the exercise of its paramount power, has unmistakably indicated its intention that the consolidated institution should succeed to the rights of the State institution to continue to exercise the trust and fiduciary functions in question. Congress has deemed the right to exercise such powers a necessary incident to the consolidation in order to give it practical effect, and has deemed the right of such consolidation to be essential to the protec-

tion of the National System and to enable it to withstand the competition of the State system. It is not believed that it is within the power of the State to nullify the intent of Congress.

F. G. AWALT,
Counsel for the Comptroller of the Currency.
GEORGE P. BARSE,
Assistant Counsel
for the Comptroller of the Currency.

No. 469

In the Supreme Court of the United States

OCTOBER TERM, 1926

EX PARTE WORCESTER COUNTY NATIONAL BANK, OF WORCESTER, A CORPORATION, APPELLANT

IN RE ESTATE OF JULIA A. LEONARD

MOTION OF FEDERAL RESERVE BOARD FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE

WALKER WYATT,
General Counsel, Federal Reserve Board,
GEORGE B. VEST,
Assistant General Counsel, Federal Reserve Board.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 469

EX PARTE WORCESTER COUNTY NATIONAL BANK, of Worcester, a corporation, appellant

---

IN RE ESTATE OF JULIA A. LEGNARD

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ

May it please the Court:

The undersigned, as Counsel for the Federal Reserve Board, respectfully move this Honorable Court for leave to file the accompanying brief in this case as amicus curiæ.

WALTER WYATT,
General Counsel, Federal Reserve Board.

GEORGE B. VEST,
Assistant Counsel, Federal Reserve Board.

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 469

EX PARTE WORCESTER COUNTY NATIONAL BANK, OF Worcester, a Corporation, appellant

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IN RE ESTATE OF JULIA A. LEGNARD

BRIEF OF THE FEDERAL RESERVE BOARD AS AMICUS CURIÆ

With leave of the Court, the Federal Reserve Board files this brief as amicus curiæ.

PRELIMINARY STATEMENT

The outcome of this case is a matter of grave concern to the Federal Reserve System. If the decision of the Supreme Judicial Court of Massachusetts is not reversed, an increasing number of national banks will be lost to the National Banking System, which will indirectly result in loss in membership of the Federal Reserve System, both in

numbers and in resources. The result will be a gradual weakening of the Federal Reserve System, with a corresponding impairment of efficiency in carrying out the purposes for which it was created.

FACTS

The facts in the case, which are set out in more detail in appellant's brief, may be stated here briefly as follows: On April 21, 1926, the Fitchburg Bank and Trust Company, a corporation organized under the laws of Massachusetts, was appointed executor of the will of Julia A. Legnard by the Probate Court of Worcester County, Massachusetts, pursuant to the provisions of the will. (Record, pp. 3, 5, and 7.) The probate was allowed on April 21, 1926. Thereafter on June 27, 1927, a certificate was issued by the Comptroller of the Currency approving the consolidation of the Merchants National Bank of Worcester, Massachusetts, and the Fitchburg Bank and Trust Company. The consolidated bank took the name of Worcester County National Bank of Worcester. This consolidation was effected under national charter pursuant to a provision of the Act of Congress of February 25, 1927, Chapter 191, Sec. 1, 44 Stat. 1225, 12 U. S. C. Chapter 2, Sec. 34 (a), providing for the consolidation of any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, with a national banking association located in the same county, city, town or village, under the charter of such national banking associa-

tion under certain conditions, and providing further that the "consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interests including the right of succession as trustee, executor, or any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association."

Thereafter on the 11th day of February, 1928, the Worcester County National Bank of Worcester attempted to file the first and final account of the Fitchburg Bank and Trust Company as executor covering a period between the 21st day of April, 1926, and the 9th day of February, 1928. The account was rendered for the trust company to June 27, 1927, and thereafter as the national bank's own account. (Record, p. 8.) The Probate Judge found that the account was in proper form and should be allowed if the Worcester County National Bank, as successor or otherwise, is executor of the will, or has the right to render the account under the laws of the United States. (Record, p. 12.) He further stated, "Without action upon said account, I report the above facts and the question of law involved, for the consideration and determination of the Full Court, as to whether the petitioner is entitled to render said account." (Record, p. 13.) Thereafter on May 24, 1928, the Supreme Judicial Court of Massachusetts answered the question submitted in the negative, holding the Federal statute

involved unconstitutional, and instructed the Probate Court accordingly. (Record, p. 30.) Pursuant to these instructions the Probate Court of Worcester County entered upon its docket an item dismissing the petition for the allowance of the account.

IMPORTANCE OF DECISION TO FEDERAL RESERVE SYSTEM

The purpose of this brief is to show to the court the interest of the Federal Reserve Board in this case and especially the importance of its outcome to the entire Federal Reserve System. National Banks, all of which under the law are members of the Federal Reserve System, constitute by far the greater number of the Federal reserve membership, the State banks being in comparatively small proportion; and accordingly any factor which seriously affects national banks is a matter of correspondingly serious importance to the Federal Reserve System.

It is not intended in this brief to argue the strictly legal points involved in the case. The constitutionality of the statute before the court is thoroughly covered in appellant's brief and the arguments made in that brief, it is submitted, are conclusive of the authority of Congress under the Constitution to enact this legislation. Being in full accord with the arguments and reasoning in the brief of appellant, it is deemed unnecessary here to reiterate what is there said.

In the past few years there has been an increasing tendency toward consolidation of financial institutions. If national banks are to live and survive side by side with State institutions, they must be enabled to consolidate under national charter with State banks as well as with other national banks on terms preserving to the consolidated national banks the right to continue the execution of the fiduciary business on the books of the constituent State banks. A State trust company planning to consolidate with a national bank is usually acting under appointments as trustee, executor, or in other fiduciary capacities and also usually has on hand ambulatory wills naming it as executor or other fiduciary, and the important question arises whether the proposed consolidated bank will be legally entitled to continue to transact this business. If it is thought that there will be doubt on this point in the event that the consolidation is effected under national charter, then the decision will be to consolidate not under national charter but under State charter, where the trust business may be preserved to the consolidated institution without legal entanglements. The national banking system will thus lose a member, and often members lost in this way are among the largest and most important banks because among institutions of this class consolidations frequently occur.

It is true that the loss of a member of the national banking system through such consolidations may not necessarily mean the loss of a member of the

Federal Reserve System; the consolidated State institution may elect to become a member of the Federal Reserve System and may apply and be admitted to the system. On the other hand, it may decide to remain outside the Federal Reserve System. Even if it elects to become a member, however, its membership as a State Bank is then optional and it is permitted under the law to withdraw from the system when it desires to do so after giving the required statutory notice. It will thus readily be seen that continued loss of membership in the national banking system through consolidations under State charter may in time bring about a serious defection both in numbers and in resources of the Federal Reserve membership. It was to prevent such losses to the national banking system and thus indirectly to the Federal Reserve System that Congress enacted the statute authorizing the consolidation under national charter of a State bank with a national bank, preserving to the consolidated national bank the trust business of the State institution.

It is obvious that if the Federal Reserve System is to continue to carry out the purposes for which it was created and is to continue to provide the credit and currency facilities contemplated by Congress in establishing the System, it is essential that it retain within its limits a sufficient membership in point of numbers and of resources to enable it to function efficiently in these directions. A gradual depletion in its membership will bring with it a

corresponding weakening in its effectiveness of operation and, as the assets and numbers of the banks outside the Federal Reserve System are increasingly strengthened, there may result a complete inability to accomplish the objects for which the System was created. The purpose of Congress in establishing the Federal Reserve System will thus be defeated, while the increasingly powerful group of banks outside the Federal system will exercise their growing influence upon credit and finance without the safeguards which Congress has deemed essential to the national interests.

It is submitted in conclusion that the statute before the Court is necessary to the continued existence and the effective operation of the Federal Reserve System and is constitutional.

Respectfully submitted.

WALTER WYATT,
General Counsel, Federal Reserve Board.
GEORGE B. VEST,
Assistant Counsel, Federal Reserve Board.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 469

EX PARTE WORCESTER NATIONAL BANK OF WORCESTER, MASSACHUSETTS.

APPEAL FROM THE PROBATE COURT OF WORCESTER COUNTY, STATE OF MASSACHUSETTS.

MOTION FOR LEAVE TO FILE AND BRIEF OF COUNSEL FOR CONTINENTAL NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AS AMICUS CURIAE.

CARL MEYER,
Counsel for Continental National Bank and Trust Company of Chicago, as Amicus Curiae.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 469

EX PARTE WORCESTER NATIONAL BANK OF WORCESTER, MASSACHUSETTS

APPEAL FROM THE PROBATE COURT OF WORCESTER COUNTY, STATE OF MASSACHUSETTS.

MOTION OF COUNSEL FOR CONTINENTAL NATIONAL BANK AND TRUST COMPANY OF CHICAGO FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Continental National Bank and Trust Company of Chicago, respectfully moves this Honorable Court for leave to file the accompanying brief in this case, as *amicus curiae*.

CARL MEYER,
Counsel for Continental National Bank and Trust Company of Chicago, as Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 469

EX PARTE WORCESTER NATIONAL BANK OF WORCESTER, MASSACHUSETTS

APPEAL FROM THE PROBATE COURT OF WORCESTER COUNTY, STATE OF MASSACHUSETTS.

BRIEF OF COUNSEL FOR CONTINENTAL NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AS AMICUS CURIAE.

The Interest of the Continental National Bank and Trust Company of Chicago.

The undersigned is asking leave to file this brief as *amicus curiae* by reason of being counsel for and at the request of the Continental National Bank and Trust Company of Chicago, which Bank was formed by consolidating the Continental and Commercial Trust and Savings Bank, a State bank organized under the laws of Illinois, with the Continental and Commercial National Bank under the charter of the latter bank, by virtue of the provisions of Section 1 of the Act of Congress of February 25, 1927 (c. 191, 44 St. 1224; Sec. 34a, Title 12, U. S. C. Sup. I, p. 53), popularly known as the McFadden Act and which by its terms became Section 3 of the Act of November 7, 1918 (c. 209, 40 Stat. 1043; U. S. C. Title 12, secs. 32, 33). This consolidation was made effective on November 30, 1927 and on that date the Comptroller of the Currency issued his certificate of ap-

proval of said consolidation. Immediately thereafter the Federal Reserve Board issued its permit to the consolidated bank to act as executor, etc. as provided for in the Federal Reserve Act.

At the time of the consolidation the National Bank had a capital surplus and undivided profits of approximately $51,000,000. and deposits of approximately $417,500,000., and the State Bank had a capital, surplus and undivided profits of approximately $17,700,000., and deposits of approximately $113,200,000. The State Bank likewise was acting as executor in a large number of estates and as trustee under trusts involving a large amount of money. The consolidated bank upon the consolidation ~~entered upon and~~ continued to administer all of such estates and execute all of such trusts which had theretofore been committed to the care of the State Bank.

The decision of the Massachusetts court which has been appealed from in the case at bar raises the question of the right of the consolidated bank to act as executor or trustee in connection with any of the estates or trusts which had before the consolidation been administered by the State Bank. It is submitted therefore that the above facts show sufficient reason for the application of the undersigned to file this brief.

It may not be out of place to advise the court in addition that there is now being consummated a consolidation of the business, interests and properties of the Continental National Bank and Trust Company of Chicago and the Illinois Merchants Trust Company, a State Bank organized under the laws of Illinois with a capital, surplus and undivided profits of approximately $47,500,000. and deposits of

approximately $374,500,000., which is likewise acting as executor and trustee in a large number of estates.

The difficulty suggested by the Massachusetts' decision will be entirely avoided in a consolidation between two State Banks under the laws of Illinois, inasmuch as the Supreme Court of Illinois in the case of *Chicago Title and Trust Company* v. *Zinser*, 264 Ill. 31, hereafter referred to, has definitely held that where two trust companies consolidate under the laws of Illinois, the consolidated company becomes by virtue of the consolidation entitled to execute trusts and administer estates theretofore committed to the care of one of the consolidating companies. The interested parties are therefore consummating the matter by having a transfer of the assets of the National Bank (excepting certain reserved assets and its trusts and trust assets) made to a State Bank organized under the laws of Illinois, which Bank will then be consolidated with the Illinois Merchants Trust Company under the laws of Illinois. This will of necessity result in a withdrawal from the National Banking System of the new consolidated bank which will be purely a State Bank.

ARGUMENT.

The sole question to be determined is whether Congress after first providing in Section 1 of the Act of February 25, 1927, *supra*, a method for consolidating a State with a National bank had the power under the Constitution to further provide that

> "all the rights, franchises and interests of such State or District bank so consolidated with a national banking association in and to every species of property, real, personal and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises and interests including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association."

That Congress has the power to authorize the consolidation of a state bank with a national bank cannot, in view of the decisions of this court, be seriously questioned. When the power of Congress to enact legislation permitting the conversion of a state bank into a national bank was attacked this court in no uncertain language definitely and for all time settled the question and said: "It was as competent for Congress to authorize the transmutation as to create such institutions originally." *Casey* v.

Galli, 94 U. S. 673. In fact Chief Justice Rugg, in the instant case, says (R. 19; 162 N. E. 217, 220):

> "We are unable to perceive any sound distinction between the power of Congress to authorize the conversion of a State bank into a national bank and its power to authorize the consolidation of a State bank with a national bank under the charter of the national bank. If no State legislation was necessary to accomplish such conversion, it seems to us that no State legislation is necessary to accomplish such consolidation. Relying upon the authority of *Casey* v. *Galli*, 94 U. S. 673, we are of opinion that in general consolidation of a Massachusetts trust company with a national banking association as prescribed in the Act of Congress of February 25, 1927, c. 191, Sec. 3, is permissible and valid."

This court has heretofore been called upon to define the status of the two banks after a conversion of a State bank into a national bank.

In *Metropolitan Bank* v. *Claggett*, 141 U. S. 520, an action was brought to recover on certain bank bills which had been issued by the Metropolitan Bank of New York, a bank which had afterwards been converted under the National Banking Laws into the Metropolitan National Bank. The defendant claimed that the state bank had closed its business of banking more than six years before, and that therefore under the laws of New York applicable thereto the liability on the notes in question was barred. This court in affirming the decision of the Supreme Court of New York which held defendant liable said (p. 527):

> "The court (New York court) decided that the New York statute providing for a redemption of circulating notes and for releasing the

bank, if the notes were not presented in six years, applied alone to banks 'closing the business of banking'; that the change or conversion of the Metropolitan Bank into the Metropolitan National Bank did not 'close its business of banking' nor destroy its identity or its corporate existence, but simply resulted in a continuation of the same body with the same officers and stockholders, the same property, assets and banking business under a changed jurisdiction; that it remained one and the same bank, and went on doing business uninterruptedly; * * *. This decision is so manifestly correct that it needs no argument to sustain it."

In *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, a national bank which had been converted from a state bank known as the Michigan Insurance Bank, sued in the name of the Michigan Insurance Bank on a judgment rendered in favor of that bank before conversion. The defendant offered evidence showing the conversion in support of a plea of *nul tiel* corporation. This court said (p. 300):

"The evidence offered by the defendant on this point wholly failed to support this defence, and at most only proved that the plaintiff sued by the wrong name. It showed no more than that the plaintiff corporation, having been originally created by the laws of Michigan, had, in accordance with the National Banking Act, become a national bank, and its name been changed accordingly, without affecting its identity, or its right to sue upon obligations or liabilities incurred to it by its former name. Act of June 3, 1864, c. 106, s. 44; 13 Stat. 112; Rev. Stat. s. 5154; *Metropolitan Bank* v. *Claggett*, 141 U. S. 520; *Atlantic Bank* v. *Harris*, 118 Mass. 147; *City Bank* v. *Phelps*, 86 N. Y. 484; and 97 N. Y. 44."

This court has therefore definitely stated that even though upon such a conversion a new charter is issued by the federal authorities and the bank is no longer subject to the jurisdiction of the State of its original creation such change or conversion did not "destroy its (the State bank's) identity or its corporate existence" and that its name had been changed "without affecting its identity or its right to sue upon obligations or liabilities incurred by it by its former name".

How could language be stronger? In the Statute now before the court the State bank is authorized to *consolidate* with the National bank *under the charter of the latter*, whereas under the conversion statute the State bank is authorized to *convert* into a National bank *under a new charter*. Certainly no one can successfully contend that consolidation under an existing National charter creates more of a change in status than does conversion under an entirely new National charter. If the identity of the State bank or its corporate existence was not destroyed in the one case, then certainly its identity and corporate existence are not destroyed in the other.

The Massachusetts court seems to recognize the force of the decisions above quoted, but endeavors to minimize their effect by stating (R. 22, 162 N. E. at p. 221) that the expressions used by this court "were used in judgments touching contract litigation and must be interpreted as applicable to the facts then before the court", and that

> "such expressions and decisions occurring in different connections and rendered upon different issues cannot rightfully be stretched to include a situation like that here presented * * *. They are not applicable to the peculiar posi-

tions of trusts like executor, administrator and other fiduciaries."

The decisions, however, of this court in the two cases cited did not depend at all upon the question that a contract rather than a relation of trust was involved. The two decisions went squarely on the ground that when a state bank is converted into a federal bank under the provisions of the National Banking Act, neither the identity of the state bank nor its corporate existence was destroyed, but "it remained one and the same bank."

In addition to the two cases it is interesting to find what some other courts have held on the question.

In *City National Bank of Poughkeepsie* v. *Phelps*, 97 N. Y. 44 (1884), referred to with approval by this court in *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, 300 *supra*, the defendant executed a guaranty to the City Bank of Poughkeepsie guaranteeing the payment of any sum not exceeding $5,000, which one Woodruff might require of the bank. The bank was afterwards converted into a national bank. The court in holding that the guarantor could be held for advances made to Woodruff *after the conversion* said:

> "The general scheme of the National Banking Acts is that State banks may avail themselves of its privileges and subject themselves to its liabilities, without abandoning their corporate existence, without any change in the organization, officers, stockholders, or property, and without interruption of their pending business or contracts. All property and rights which they held before organizing as National banks are continued to be vested in them under their new status. Great inconveniences might result if this saving of their existing assets did not include pending executory contracts, and

> pending guarantees, as well as vested rights of property. Although, in form, their property and rights as State banks purport to be transferred to them in their new status of National banks yet in substance there is no actual transfer from one body to another but a continuation of the same body under a changed jurisdiction. As between it and those who have contracted with it, it retains its identity, notwithstanding its acceptance of the privilege of organizing under the National Banking Act."

It has always been held that a contract of guaranty is of such a highly personal nature that running in favor of one person it cannot be taken advantage of by another, but the court found no difficulty in arriving at the conclusion that the national bank was entitled to make advances on the faith of a contract of guaranty running in favor of a state bank from which it had been converted, as the National bank was "but a continuation of the same body".

To the same effect as *City National Bank of Poughkeepsie* v. *Phelps, supra,* is *First National Bank of Pontiac* v. *Talbert,* 103 Mich. 625; 61 N. W. 888 (1895) where it appeared that a statute of Michigan provided that upon dissolution of a national bank it could be reorganized into a state bank in which should vest all of the assets of the national bank. One Talbert prior to such a reorganization executed a document guaranteeing the national bank on the renewals it might make of the paper of one Moore. The state bank resulting from the reorganization renewed certain notes of Moore, and the court in holding that Talbert was liable to the state bank on these renewals said that the case was

> "precisely analogous to *City National Bank* v. *Phelps,* 97 N. Y. 44."

In *Poisson* v. *Williams,* 15 Fed. (2nd) 582 (D. C. N. C. 1926), in holding that a trust should be imposed upon certain funds in the hands of the Receiver of a national bank which some time before had been converted from a state bank, the court said:

> "There can be no question that the American Bank & Trust Company received and held the proceeds of the sale of the tram road and equipment as trustees of an express trust, or that the funds in its hands constituted a trust fund for the benefit of the bondholders secured by the deed of trust; and I think it is equally clear that, if the trust fund was in the vaults of the bank when it was converted into a national banking association, it continued to be impressed with the trust in favor of the bondholders. The change from a state to a national bank did not 'destroy its identity or its corporate existence, but simply resulted in a continuation of the same body, with the same officers and stockholders, the same property, assets, and banking business under a changed jurisdiction.' *Metropolitan Bank* v. *Claggett,* 141 U. S. 520, 12 S. Ct. 60, 35 L. Ed. 841; 7 C. J. 760; and cases cited; note, 59 Am. St. Rep. at page 553."

If it is established as we believe it has been established by the decisions above referred to that a national bank converted from a state bank is but a continuation of and identical with the state bank, and if Congress has the power to confer upon national banks the right to act as trustee, executor, etc., when not in contravention of state law (*First National Bank of Bay City* v. *Fellows,* 244 U. S. 416) and to declare that where the laws of a state authorize banks or trust companies to exercise trust functions the exercise of such powers by national

banks shall not be deemed in contravention of state law (*State of Missouri ex rel. Burnes National Bank* v. *Duncan*, 265 U. S. 17), it would seem to logically follow that Congress has the power to declare that a national bank resulting either from conversion of a state bank or from the consolidation of a national bank with a state bank shall be entitled to act as executor and trustee in cases where the state bank was so acting before conversion or consolidation.

There is likewise an abundance of authority to show that corporations with trust powers consolidating under statutes which provide in substance that the consolidated corporation shall hold and enjoy "all the rights of property, franchises and interest, including the right of succession as trustee, executor or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed," etc. are entitled to exercise trusteeships and executorships theretofore vesting in either of the consolidating corporations.

In *Chicago Title and Trust Co.* v. *Zinser*, 264 Ill. 31, 105 N. E. 718 (1914) *supra*, the Supreme Court of Illinois held that where two Illinois corporations, the Real Estate Title and Trust Company and the Chicago Title and Trust Company were pursuant to the laws of Illinois consolidated under the name of the latter corporation, letters were properly issued to the consolidated corporation to act as executor and trustee under a certain will in which the Real Estate Title and Trust Company had been so named. The consolidation of the two corporations had taken place after the making of the will, but before the death of the testatrix.

In a bill for specific performance brought by the consolidated corporation as executor, the question was raised as to whether the deed theretofore tendered to the defendant by the consolidated corporation, had been tendered by some person or corporation having power to act under the will.

The Court said (264 Ill. at p. 35):

> "By the consolidation of the Real Estate Title and Trust Company and the Chicago Title and Trust Company the original corporations *ceased to exist*, and the appellee, as the consolidated corporation, *acquired* and *succeeded* to all the faculties, property, rights and franchises of its component parts and became subject to all the duties, obligations and conditions imposed upon them. (*Robertson* v. *City of Rockford*, 21 Ill. 451; *Chicago, Rock Island and Pacific Railroad Co.* v. *Moffitt*, 75 id. 524.) The material question here is whether the general rule that a trustee cannot delegate his authority to another is an obstacle to the exercise of a power by the appellee to act as executor or trustee where one of the constituent corporations was named as such. That general rule rests upon the ground that the selection of a trustee implies personal confidence in his discretion and judgment. If a power is given to an executor or trustee which is not ministerial or given for the purpose of executing a declared trust which the court can enforce but which involves the exercise of discretion and judgment, the power cannot be delegated or transferred to another, either by the trustee or a court. The rule, however, cannot be applied to the case of a corporation, because the element of trust in the judgment and discretion of an individual is entirely wanting. A corporation is without personality, and if it is selected as trustee or executor there can be no reliance upon individual discretion or even upon

the continuance of the same administration. Etta Nelson, in naming the Real Estate Title and Trust Company as executor and trustee, knew that its directors, officers and stockholders might change from time to time, and that the statute authorized a change of name or place of business, enlargement or change of the object for which the corporation was formed, an increase or decrease of capital stock or change in the number of shares or par value, increase or decrease of the number of directors, and the consolidation of the corporation with any other corporation then existing or that might thereafter be organized. She therefore contemplated that these changes might occur and that the Real Estate Title and Trust Company might be consolidated with some other corporation such as the Chicago Title and Trust Company, and that it would thereby *cease* to exist and become a component part of a new corporation. A consolidation took place and a new corporation was created from the original corporations, with an enlarged capital stock and unimpaired franchises. The appellee was entitled to execute the trust, and the chancellor did not err in overruling the demurrer."

In *In re Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714 (1912) the Court of Appeals of New York held that where a trust company was designated as trustee under a will, and after the testator's death it had been merged into a second company, the second company was entitled to act as executor under the provisions of the New York statutes which provided that upon such merger all the rights, franchises and interests of the merged company should vest in the second company and empowering the second company to hold and enjoy all the rights, property, fran-

chises and interests of the first company. The court said:

> "The designation of the Morton Company (the first company) as an executor created a privilege or an interest in the estate of the testator appertaining to that company. The privilege or interest was not complete or vested. * * * The merger transferred it to the Guaranty Company, and, in effect, substituted that company for the Morton Company. The Guaranty Company was entitled to hold and enjoy it even as would the Morton Company under an unmerged existence. By virtue of the statute, effective as a part of the will, the Guaranty Company was designated as an executor, and as such, is entitled to receive the letters testamentary."

In *Mercantile Trust Co.* v. *San Joaquin Agricultural Corporation*, 265 Pac. 583 (1928), the California Court of Appeals held that under a statute providing that upon consolidation of banks and trust companies, the consolidated bank should succeed to the properties, trusts, claims, demands, etc., of the two corporations consolidating, the consolidated corporation was entitled to act as trustee under a mortgage executed before the consolidation and in which one of the consolidating corporations was named as trustee.

In view of the foregoing the conclusion seems almost irresistible that a State bank could be converted into a National bank carrying with it all trusts and trust powers and that such National bank could then consolidate with another National bank which consolidated bank would thereby be clothed with all the trusts and trust powers of the original State bank. If such be the fact, then it seems clear

that Congress has the power to accomplish this same result by the direct method of consolidation adopted in the McFadden Act, *supra*.

Congress by the statutes here under consideration has in effect declared that a state bank or trust company which has been appointed executor or trustee or has the right to be appointed as such shall not be penalized by forfeiting those offices or that right when it is transmuted into a National banking system by consolidation with a National bank.

The fallacy of the Massachusetts court's reasoning is due to its unwillingness to recognize that for the purpose of carrying out its obligations the State bank is still in existence and therefore there has been no usurpation of judicial functions or authority and no substitution of a new executor without the authority of the court. The Fitchburg Bank and Trust Company has been consolidated with the Worcester County National Bank and for the purpose of carrying out all trusts, executorships and other fiduciary relations entrusted to its care is still in existence, although under a different name and different charter, as held in the Claggett and Eldred cases. The very same arguments on which the Massachusetts court bases its judgment were made in the *Fellows* and *Burnes cases, supra*.

It is respectfully submitted that the order appealed from should be reversed and the cause remanded to the Probate Court of Worcester County, Massachusetts, with directions to that court to proceed accordingly.

Respectfully submitted,

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